No. 97-737

Supreme Court, U.S.
FILED
DEC 29 1997
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1997

ALEXANDER S., et. al.

Petitioners,

v.

FLORA BROOKS BOYD, in her capacity as Director of the Department of Juvenile Justice,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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80 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

JURISDICTIONAL STATEMENT 1

STATEMENT OF THE CASE 2

STANDARD OF REVIEW 5

ARGUMENT I 6

ARGUMENT II 13

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Alexander S. v. Boyd,
876 F.Supp. 773 (D.S.C. 1995) . . 1, 3

Ex parte Gilliam, 26 C.2d 860,
161 P.2d 793 (1945) 13

Helvering v. Hammel,
311 U.S. 504 (1940) 12

In Interest of V.P.,
139 Ill.App.3d 786,
487 N.E.2d 638 (1985) 13

People v. Thomas, 58 Mich.App. 9,
226 N.W.2d 734 (1975) 13

Rum Creek Coal Sales, Inc. v.
Caperton, 31 F.3d 169
(4th Cir. 1994) 5, 6

U.S. v. American Building
Maintenance Industries,
422 U.S. 271 (1975) 12

FEDERAL STATUTES

PLRA § 802(a)(g)(7) 7

18 U.S.C. § 3626(g)(3) 6

18 U.S.C. § 3626(g)(5) 12

18 U.S.C. § 3006A 8, 10

20 U.S.C. Section 1400 et. seq. . . . 3

29 U.S.C. § 794 3

42 U.S.C. § 1988 . . . . . 1, 5, 9, 10

42 U.S.C. § 1983 . . . . . 1, 3

42 U.S.C. § 1997e 5, 6, 15

42 U.S.C. § 1997e(d) 5, 6, 8, 9, 11, 12

42 U.S.C. Section 12201 et. seq. . . 3

JURISDICTIONAL STATEMENT

This appeal arises from the decision of the United States Court of Appeals for the Fourth Circuit entered May 28, 1997, reversing the decision of the United States District Court for the District of South Carolina on two orders awarding attorneys' fees and expenses pursuant to 42 U.S.C. § 1988 to the Plaintiffs in an underlying 42 U.S.C. § 1983 action. See, Alexander S. v. Boyd, 876 F.Supp. 773 (D.S.C. 1995). The Petitioners timely filed a Petition for Rehearing and Suggestion of Rehearing En Banc, which was denied by Order of the Fourth Circuit entered July 29, 1997.

Petitioners assert they filed their Petition for Writ of Certiorari on October 24, 1997. The initial notice which Respondent received was a docketing sheet from this Court sent by the National Prison Project on November 4, 1997 via Federal Express to Respondent's law firm, to 1500 Hampton Street--an address which is more than six years old. That docketing sheet was forwarded by Federal Express to Counsel for Respondent on November 7, 1997. When Counsel for Respondent contacted Counsel for Petitioners, she was informed that that address was on the original pleadings in this case, and that the ACLU did not have our current address.

When informed that we had never received the three copies of the Petition for Writ of Certiorari required by Supreme Court Rule 29 (3) and that the single docketing sheet which we received had been sent to a previous address, Counsel for Petitioners then mailed via Federal Express one copy of the Petition for Writ of Certiorari, which we received November 14, 1997.

On November 21, 1997, the Lex Group mailed to Counsel for Respondent, via U. S. Mail, an affidavit of service that three copies of the Petition and the Appendix had been re-served on Counsel for Respondent. An Affidavit of Service was included that the LEX Group had served on Counsel for Respondent three copies of the Petition at our current address on October 24, 1997.

Counsel for Respondent maintains that neither filing nor service were timely in accordance with Supreme Court Rule 13, and the Petition for Writ of Certiorari was jurisdictionally out of time, and should be dismissed.

STATEMENT OF THE CASE

This case consolidates the appeal of two District Court Orders awarding attorneys' fees and costs to Plaintiffs' counsel. The award was made to two law firms which jointly represented a class of juveniles challenging the conditions

of their confinement in institutions operated by the South Carolina Department of Juvenile Justice [hereinafter referred to as "DJJ"].

On December 28, 1990, the Plaintiffs filed the underlying action seeking declaratory and injunctive relief, along with damages, from DJJ. The Plaintiffs' case arose under 42 U.S.C § 1983 and three interrelated federal education statutes: the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 et. seq. ("IDEA"); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 ("Section 504"); and the Americans with Disabilities Act, 42 U.S.C. Section 12201 et. seq. ("ADA"). The case was tried before the District Court in June through August of 1994, and the District Court issued an Order on January 25, 1995. See Alexander v. Boyd, 876 F. Supp. 773 (D.S.C. 1995). The Court found certain aspects of the confinement of the class of juveniles unconstitutional, and ordered the Department of Juvenile Justice to implement a corrective plan. The Court denied damages as a remedy but awarded attorneys' fees to plaintiffs' counsel, which fees have been paid. A hearing was held at Plaintiffs' insistence in December, 1995, on the sole issue of juvenile-on-juvenile violence.

On February 16, 1996, the district court issued an Interim Order on Staffing

Issues and Attorney's Fees which specified the procedure the parties were to follow regarding Plaintiffs' applications for attorneys' fees. Plaintiffs have submitted monthly applications to the Court. This appeal involves the fees for the period from February through July, 1996 and December 1995 through January 1996.

STATEMENT OF FACTS

From December 18 through 20, 1995, Plaintiffs' motion to modify DJJ's remedial plan on the issue of staffing was heard by the District Court. During the hearing, DJJ proposed a new staffing plan which the Court permitted DJJ to implement in its Order dated February 16, 1996. Subsequently, Plaintiffs' counsel submitted an application for payment of attorneys' fees including time spent relating to their motion on the staffing issue. By Order dated May 29, 1996, the District Court awarded attorneys' fees to Plaintiffs over DJJ's objection that the results obtained by Plaintiffs did not justify the award of the full amount.

Plaintiffs subsequently filed additional monthly applications for awards of attorneys' fees with the Court for the months of February through July, 1996. In its Order dated August 30, 1996, the District Court awarded fees to

Plaintiffs based on these monthly applications.

It is important to recognize that both Orders on appeal issued after the date on which the amendments to 42 U.S.C. § 1997e became effective on April 26, 1996. The District Court, however, ruled that those amendments did not apply to this case. (Order dated August 30, 1996 at J.A. p. 72).

SUMMARY OF THE ARGUMENTS

Argument I

The Prison Litigation Reform Act of 1995 ("PLRA") is applicable to Plaintiffs' Counsels' applications for fees for the months of May, June, and July, 1996 as well as December, 1995 and January, 1996. 42 U.S.C. § 1997e(d), as amended by the PLRA, requires that Plaintiffs' Counsels' hourly rate be capped at $112.50 per hour, rather than the proposed $225.00 per hour.

STANDARD OF REVIEW

The usual scope of review of an award of attorneys' fees under 42 U.S.C. § 1988 is whether the District Court abused its discretion. Rum Creek Coal Sales, Inc. v. Caperton, 31 F.3d 169 (4th Cir. 1994). This deferential standard of review is modified by a closer review,

when, as in this case, an issue of statutory construction is involved. Rum Creek Coal Sales, Inc., supra at 174.

I. The Amendments to 42 U.S.C. § 1997e Require That the Hourly Rate Used to Compute The Plaintiffs' Award of Attorneys Fees Be Reduced.

After the Court issued its Interim Order on Staffing Issues and Attorneys' Fees on February 16, 1996, Plaintiffs have submitted monthly Motions for Fees and Costs pursuant to 42 U.S.C. § 1988 for services performed by Fairey, Parise & Mills ("FP&M").

DJJ submits that the Prison Litigation Reform Act of 1995 ("PLRA") affects those fee awards. The amendments to 42 U.S.C. § 1997e(d) increase the Plaintiffs' burden of proof to establish entitlement to an award of fees and limit the hourly rate on attorneys' fee awards. Moreover, the statute is retroactive insofar as it affects work done but not compensated prior to the effective date of the act.

There is no vested right to any hourly attorneys' fee.
Plaintiffs' counsel do not have a vested right to the $225 per hour fee which was awarded in the January 1995 Order on the merits. What constitutes reasonable attorneys' fees must be determined by a trial court in retrospect, after ruling

on the merits of the case. Attorneys' fees are not awarded prospectively because there is no basis for a trial judge to evaluate the extent to which the moving party has prevailed.

By amending the fee portions of the PLRA, Congress clearly intended to limit the hourly attorneys' fees which could be recovered by a prevailing party in prison litigation. In the present case, the first Order awarding attorneys' fees was not entered until May 29, 1996, one month after the effective date of the amendments to the PLRA. However, that order was not a final order on the merits. Based on the clear legislative intent, it was error for the District Court to award fees in excess of the statutory limits established in the PLRA.

The PLRA is expressly retroactive to all awards of "prospective relief"[1]:

> (b) Application of Amendment.-
>
> (1) In General.- Section 3626 of title 18 United States Code, as amended by this section, shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or

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[1]Prospective relief is defined in the PLRA as all relief other than compensatory money damages. PLRA § 802(a)(g)(7).

> after the date of the enactment of this title.

When this section is read as part of a comprehensive legislative scheme, it is clear that Congress intended the amendments to apply retroactively, when, as in this case, "prospective relief" is awarded. That is to say, a fee is not a fee until the Court has awarded it, and the Court should follow the law then in effect in computing a fee. Under the amended version of 42 U.S.C. § 1997e(d) the maximum allowable hourly rate of attorneys' fees is limited to one hundred fifty percent (150%) of the hourly rate established under 18 U.S.C. § 3006A.[2] Because the effective date of the legislation is April 26, 1996, and regardless of whether the amendments should be given retroactive effect, it is clear that the legislation applies to Plaintiffs' present and future applications for attorneys' fees. At the very least, all Court-approved billable hours which Plaintiffs have submitted

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[2]Defendants do not however agree that the amount of the hourly rate should automatically be set at $112.50 for all attorneys involved, and for all time spent on the litigation. The PRLA would make that figure the maximum allowable hourly rate.

since April 26, 1996 should be reduced to a maximum rate of $112.50 per hour.

In its order dated May 29, 1996, the Court declined to rule on the applicability of the PLRA because the services for which fees were sought had been performed before April 29, 1996, the effective date of the legislation. That conclusion is erroneous, because the key date is the date on which fees were awarded rather than the date services were rendered.

The amended version of 42 U.S.C. § 1997e(d) provides:

> (d) ATTORNEY'S FEES. - (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 2 of the Revised Statutes of the United States (42 U.S.C. 1988), such fees shall not be awarded, except to the extent that
>
> > (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 2 of the Revised Statutes; and

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of title 18 United States Code for payment of court-appointed counsel. (Emphasis added.)

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 2 of the Revised Statues of the United States (42 U.S.C. 1988).

In District Court, Plaintiffs' counsel conceded that the class members are all "prisoners" under the PLRA (See, Plaintiff's Memorandum of Law at p. 2, n. 1; J.A. at 53) .[3] However, Plaintiffs contended that the limitations on attorneys' fees contained within the PLRA were inapplicable because D.J.J. is not a "jail, prison or other correctional facility." Although Plaintiffs have conceded that they are "prisoners", they challenge the fact that they are "confined within a jail, prison or other correctional facility" within the meaning of 42 U.S.C. § 1997e(d), as amended.

The term "prison" is defined in the PLRA to include "any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of

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[3]The amended version of 42 U.S.C. § 1997e(h) specifically defines the term "prisoner" as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program. The amended version of 18 U.S.C. § 3626(g)(3), which is also part of the Prison Litigation Reform Act of 1995, defines the term "prisoner" in the same fashion.

criminal law." Title VII, Sec. 802, amending 18 U.S.C. § 3626(g)(5) (emphasis added). Clearly, the D.J.J. facilities at issue would be considered a "prison" under that definition. Statutes which are originally part of the same act should be construed together. U.S. v. American Building Maintenance Industries, 422 U.S. 271 (1975); 73 Am Jur2d Statutes § 332 (1974). Following this canon of statutory construction by applying the definition of "prison" in the amended version of 18 U.S.C. § 3626(g)(5) to 42 U.S.C. § 1997e(d) leads to the inescapable conclusion that the limitations imposed upon awards of attorneys' fees by the amendments to 42 U.S.C. § 1997e(d) apply to this case.

Interestingly, the original version of the Civil Rights of Incarcerated Persons Act does not provide a statutory definition of the terms "jail" or "prison" or "other correctional facility". A cardinal rule of statutory construction is that under such circumstances, words in a statute will be given their usual and ordinary meaning. Helvering v. Hammel, 311 U.S. 504 (1940). In numerous decisions around the country, juvenile detention facilities have been considered jails, prisons or correctional

facilities.[4] See, In Interest of V.P., 139 Ill.App.3d 786, 487 N.E.2d 638 (1985); People v. Thomas, 58 Mich.App. 9, 226 N.W.2d 734 (1975); Ex parte Gilliam, 26 C.2d 860, 161 P.2d 793 (1945).

II. This case presents no compelling federal issues for review by this court.

Supreme Court Rule 10 states that certiorari is not a matter of judicial discretion. Certiorari will only be granted for "compelling reasons". The precise issue presented by this case--whether the PLRA Amendments were intended to limit attorney's fees in "prison litigation" except when the "prisoners" happen to be juveniles in a juvenile

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[4]Black's Law Dictionary defines the term "correctional institution" as "a generic term describing prisons, jails, reformatories and other places of correction and detention. Black's Law Dictionary 5th Ed. (1979). "Correction" is also defined as "discipline, treatment, and rehabilitation of offenders through confinement, parole, probation, counseling, etc." Black's Law Dictionary, supra. The very definition of "correction" seems to mirror D.J.J.'s statutory charge, thus, it would seem beyond question that D.J.J. is a correctional institution under the Prison Litigation Reform Act of 1995.

facility-- is so narrow as to lack sufficient importance to make it worthy of consideration by this Court. The Fourth Circuit correctly noted that the fee limitations do not undermine the ability of plaintiffs having meritorious claims to expose unconstitutional prison conditions. (See App. at 22-23). Further, the maximum allowable hourly rate of $112.50 is not so low as to preclude access to counsel.[5]

Contrary to Petitioners' Counsels' assertions, it would be manifestly unjust to continue to allow Petitioners' counsel to be paid at the rate of $225 per hour for monitoring which has been ongoing for almost three years. The amendments to the PLRA limited awards of attorneys' fees in all prison litigation to a reasonable fee.

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[5]It is interesting to note that Congress still retains the limitations on fees which attorneys may charge in Veteran's Administration cases at $10.00. This limit has been reaffirmed on numerous occasions by this Court.

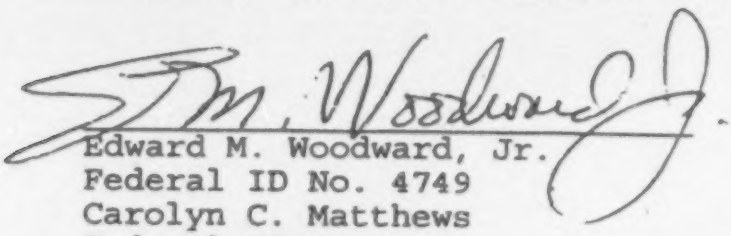
CONCLUSION

Because Plaintiffs are clearly "prisoners" confined in a jail, prison or other correctional facility, the limitations upon awards of attorneys' fees contained in the amendments to 42 U.S.C. § 1997e must be applied in this case. Further, this issue is of such narrow scope that there are not compelling reasons to grant certiorari in this case.

Therefore, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted, this the 29th day of December, 1997, in Columbia, South Carolina.

WOODWARD, COTHRAN & HERNDON



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